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Criminal Law--Extension of Felony Murder Rule

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gross negligence, or comparative negligence, or completely prohibited actions against the driver. What law should prevail? Clearly, such phrases as "center of gravity," "weighing of contacts," and "paramount control," seem inappropriate.

In conclusion then, it is submitted that the Liberal approach adopted by the New York court does not provide a cure-all. Its application should be restricted to situations closely analogous to that of the instant case.

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One of three robbers was killed by their intended victim. For this death, the two surviving co-felons were charged with first degree murder under Michigan's felony-murder rule. The trial court quashed the charge and the state appealed. *Held,* affirmed. The killing of one robber by the intended victim is not murder, but rather justifiable homicide and does not render the surviving robbers guilty of first degree murder under the Michigan statute. *People v. Austin,* 120 N.W.2d 766 (Mich. 1963).

The principal case raises the problem of deciding where the line should be drawn in applying the felony-murder rule. Those who favor extending the doctrine feel that the felon should be held responsible for all the consequences of his criminal undertaking, regardless of who is killed or who actually did the killing. Those who would restrict the application of the rule argue that it would be an infringement upon legislative powers to extend the rule to situations like the principal case because the legislatures intended that the homicide must have been directly committed by the defendant-felon or an accomplice in furtherance of the common purpose in order to invoke the felony-murder statute.

The case of *Commonwealth v. Thomas,* 382 Pa. 639, 117 A.2d 204 (1955), presented the same facts as existed in the principal case. The Pennsylvania court held the surviving robber could be convicted of first degree murder, thus expanding decisions made in *Commonwealth v. Almeida,* 362 Pa. 596, 68 A.2d 595 (1949), and *Commonwealth v. Moyer,* 357 Pa. 181, 53 A.2d 736 (1947). In the *Moyer* case an innocent party was killed during a battle between

robbers and their intended victim. By dicta the court seemed to say that it made no difference who had fired the fatal shot, the robbers were nonetheless guilty. In the *Almeida* case, an innocent party was accidentally killed when police sought to prevent a robbery. In both cases the robbers were convicted of first degree murder on the theory that they had set in motion a chain of events which was well within their contemplation when they undertook the robbery and thus they should be held responsible for all consequences of any resistance to their attempted hold-up. It was noted in the *Thomas* opinion, *supra,* that the facts in the two earlier cases were not precisely the same, but the court saw no reason to make a distinction merely because the deceased was a co-felon rather than an innocent party. The court felt that the tort theory of proximate cause was no less applicable and, in addition, public policy dictated such a holding.

The *Thomas* decision, *supra,* drew comment because of its radical extension of the felony murder rule. In 58 W. VA. L. REV. 415 (1956), the commentator viewed the holding as an alarming and dangerous precedent for use of the rule because such an extension resulted in the creation of criminal liability without fault. Two specific criticisms of the writer were: (1) the doctrine in effect ignored the requirement of *mens rea* needed for a first degree murder conviction and relied only on the *mens rea* for the basic felony; (2) the Pennsylvania statute in codifying the common law provided that any murder committed while in the perpetration of the specified felony (robbery, rape, arson, burglary, or kidnapping) would be first degree murder. Pa. Stat. Ann. tit. 18, 4701 (1954). The killing in the *Thomas* case was a justifiable homicide, not a murder; therefore, the Pennsylvania court was guilty of judicial legislation, because it had construed "murder" to mean any homicide occurring during the perpetration of the other specified felony.

In similar cases since 1955, some jurisdictions have indicated they would extend the felony-murder rule as far as the *Thomas* decision did, while others, such as Michigan in the principal decision, will prefer to continue to draw the line short of an all-inclusive doctrine. A significant subsequent development was the decision in *Commonwealth v. Redline,* 391 Pa. 486, 137 A.2d 472 (1958). Here, as in the *Thomas* case, *supra,* three years before, one co-felon was killed in an attempted robbery and the surviving accomplice was convicted of first degree murder. On appeal, the Pennsylvania Supreme Court

admitted that it had gone too far in 1955 and overruled the *Thomas* decision as an unwarranted extension of the felony-murder rule.

The majority of the court in the *Redline* decision believed that the legislature had not intended to include in felony-murder all deaths occuring in the commission of felonies without regard to who was killed and who actually did the killing. The court felt that if the public favored an expansion of the doctrine, then it was up to the legislature to make the revision, not the judiciary. A strong dissenting opinion protested the overruling of the *Thomas* case. The dissenting judge felt that it was in the best interests of public policy to stop using mere technicalities to free murderers and that the defendant was guilty of first degree murder because his felonious undertaking was the proximate cause of the death of a human being.

The Michigan court in the principal case, relied extensively on the *Thomas* and *Redline* cases, *supra,* in the majority and dissenting opinions. The majority opinion held that the killing of the co-felon by the intended victim was a justifiable homicide, not murder, and therefore no one should be charged with murder. The dissent argued that a man was killed who should not have been killed and that it was immaterial that the one killed was himself a co-felon. As to the justifiable homicide it is true that it was justifiable as to the intended victim of the robbery, but the lawful motives of the one who fired the fatal shot should not be shared by the defendants in this case. The dissent held that there was no distinction between the principal case and the previous Michigan case, *People v. Podolski,* 332 Mich. 508, 52 N.W.2d 201 (1952). In the *Podolski* case one officer was accidentally killed by another officer during a gun battle with robbers. The robbers were convicted of first degree murder. The dissent in the principal case said that no distinction should be made merely because in the *Podolski* case the killing was accidental and in this it was purposeful. It was argued that to use that factual difference to hold Austin not guilty would be to let semantics override precedent.

But the majority quoted the Michigan statute, which like Pennsylvania, used the word "murder", rather than "homicide". Like the comment in 58 W. VA. L. REV. 415 (1956), the Michigan majority did not see how such statutory language could be construed to hold that a justifiable homicide could be used to support a murder charge against the co-felons.

In other cases since 1955, California and Florida appear to agree with the now overruled *Thomas* decision in Pennsylvania. In *People v. Harrison,* 176 Cal.App.2d 330, 1 Cal. 414 (1959), and *People v. Wilburn,* 49 Cal.2d 714, 314 P. 590 (1957), the court endorsed the proximate cause theory as applicable in criminal cases. See dictum to the same effect in *Hornbeck v. State,* 77 So.2d 876 (Fla. 1955).

Cases indicating an intent to restrict the felony-murder rule are *State v. Garner,* 238 La. 563, 115 So.2d 855 (1959), and *People v. Wood,* 8 N.Y.2d 48, 167 N.E.2d 736 (1960). The latter case takes the view that to be a felony-murder the homicide must have been actually committed by a felon in furtherance of the felonious purpose.

The West Virginia statute on first degree murder provides that "murder" done while in commission of robbery, rape, burglary, and arson is first degree murder. W. VA. CODE, ch. 61, art. 2, § 1 (Michie 1961). The West Virginia court, and others, if faced with the issue raised by the principal case will have to construe the applicable felony murder statute according to their ideas of the purpose of the law, or what they feel its purpose should be. Would West Virginia, for example, agree with the dissent in the principal case that a homicide justifiable and excusable as to the actual killer, could at the same time, be murder as to another person, or would the court feel that such a construction might be in the area of judicial legislation? In 1960, U. ILL. L.F. 158, it was submitted that the felony-murder rule serves a legitimate function, but should not be expanded beyond that purpose. The writer submitted that its purpose was to aid the prosecution by requiring only proof of commission of the felony instead of having to prove "malice aforethought." Also, in 105 U. PA. L. REV. 50, 58, the writer argued that there is no good reason to hold the felon responsible. "The deterrent effect is doubtful. . . and the emotions of vengeance are an insufficient justification for the fictional attribution of the *mens rea* of murder to one whose desire was certainly not a desire to kill."

These arguments in favor of restricting the felony-murder doctrine are vigorously answered by reasoning like the dissents in the *Austin* and *Redline* cases, *supra,* thus indicating that the issue may remain unresolved for some time.

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